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No. 5707

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),
Appellant,

vs.

FRANK L. HAYES,
Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF CASE.

This is an action based upon allegations of fraudulent representations in the sale of twenty-two acres of land in the Rio Linda District, north of Sacramento City, California.

The complaint, which appears on pages 1 to 11 of the Transcript, counts upon two causes of action separately stated,—one concerning the purchase of a twelve acre tract of land, and the other, concerning, the later purchase of a ten acre tract of land.

The same representations are said to have been made as to both transactions. They are in substance, that the land was represented to be worth $400 an acre; to be rich and fertile and capable producing all sorts of farm crops and produce; to be free from

all conditions and things injurious or harmful to the growth of fruit trees; to be perfectly adapted to the raising of all kinds of deciduous fruits in commercial quantities; and capable of producing large crops of the finest quality of all kinds of deciduous fruits planted thereon; that the land was the same quality as other land in the vicinity thereof which has proven to be rich and productive and capable of producing large and profitable crops of all kinds of farm produce and particularly of large and profitable crops of deciduous fruits.

Plaintiff was a resident of Omaha, Nebraska, and traded in upon the purchase price of the California land certain real property owned by him there.

He alleges these representations were all false, stating as to the representations of value that the actual value of the land was only $25.00 an acre, or about one-sixteenth of its represented value.

To the complaint a demurrer was interposed and overruled, and after an answer was filed, the cause was tried to a jury which rendered a verdict in favor of plaintiff in the sum of $3000. This appeal is taken from the judgment entered on the verdict and presents the following questions:

Error of the Court in overruling demurrer, and that the complaint does not state a cause of action;

Error in the Court's instructions to the jury.

SPECIFICATION OF ERRORS RELIED UPON.

(1) The Court erred in overruling demurrer to the complaint, and complaint does not state a cause of action.

(See Assignment of Errors, page 28 of the Transcript, Assignment No. I.)

(2) The Court erred in instructing the jury as to the representations alleged to have been made by defendant.

(See Assignment of Errors, page 29 of the Transcript, Assignment No. III.)

(3) The Court erred in instructing the jury on the question of the falsity of the representations alleged to have been made by defendant.

(See Assignment of Errors, page 31 of the Transcript, Assignment No. V.)

(4) The Court erred in instructing the jury on the question of plaintiff's reliance on the alleged representations.

(See Assignment of Errors, page 33 of the Transcript, Assignment No. VII.)

(5) The Court erred in instructing the jury on the question of damages.

(See Assignment of Errors, page 36 of the Transcript, Assignment No. VIII.)

(6) The Court erred in instructing the jury in relation to the absence of Harris, Wanzer, Holmes and Fletcher, as witnesses.

(See Assignment of Errors, page 37 of the Transcript, Assignment No. IX.)

ARGUMENT.

THE COURT ERRED IN OVERRULING DEMURRER TO THE COMPLAINT, AND COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

The representations alleged to have been made were matters of opinion only. It is to be noted that with regard to the quality of the soil the representations were most vague and uncertain, and if made according to the allegations of the complaint, were couched in superlatives such as would convincingly stamp them as "trade talk" only. The statements that the land is rich and fertile and capable of producing all sorts of farm crops and products, do not amount to statements of fact. No land on the face of the earth will produce all sorts of farm crops and products. When that statement was made to appellee he knew it was not a statement of fact. (Of course, appellee failed to prove that such a statement was made, but we are here discussing his pleading.)

Again, no land is entirely free from all conditions and things injurious or harmful to the growth of fruit trees. Every orchardist has to combat conditions of the soil injurious to the growth of his trees. That is one of the things that goes with horticulture.

Again, no land is perfectly adapted to the raising of fruits of all kinds in commercial quantities. Such a statement by a prospective vendor to a prospective vendee would be so silly as to preclude the idea that it was a statement of fact. No land is capable of producing large crops of any kind of deciduous fruit planted thereon. To allege that such a statement was advanced as a statement of fact is absurd.

Again, no land produces crops at all times of the finest quality. Such an achievement has probably never been accomplished in all the history of horticulture. Now these statements were not made to a man who was proposing to pay money for the property referred to. This transaction was a trade. Mr. Hayes owned property which he alleges to have been worth $12,600.00, and he traded it upon that basis.

It should be remembered that this man after the representations were made to him concerning the quality and value of these lands, made an inspection trip and began an investigation touching the truth or falsity of these statements.

Under these circumstances we submit that the statements were matters of opinion only and not representations of fact, and that therefore the complaint fails to state a cause of action.

On this matter we therefore refer the Court to the following cases:

Rendell v. Scott, 70 Cal. 514;
Andrus v. St. Louis S. & R. Co., 130 U. S. 645;
Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315;
Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379;
Kimber v. Young, 157 Fed. 744, 70 C. C. A. 178, Colo. Case;
Everist v. Drake, 145 Pac. 814;
Hackleman v. Lyman, 50 Cal. App. 326-327;
12 *R. C. L. pages* 279-281;
26 *Corpus Juris,* 1215-1217;

Southern Development Co. v. Silva, 125 U. S. 259;

Halton v. Noble, 83 Cal. 7;

Gleason v. McPherson, 175 Cal. 594;

Wooleson v. Coburn, 63 App. 523.

In the case of *Rendell v. Scott,* 70 Cal. 514, the Court said:

> "It is apparent to us that the matters alleged as constituting the fraud were matters of opinion rather than of facts. It was certainly matter of opinion when the plaintiff stated that the land was the best ranch in Ione Valley, and was very rich and productive, and would produce fifty bushels of wheat to the acre; that a portion was good alfalfa land, and that another portion was rich in mineral deposits; and the other matters alleged may well be classed under the head of matters of opinion rather than a false representation of facts. There is no averment which excludes the idea of personal inspection by the purchaser."

In *Parker v. Moulton,* 114 Mass. 99, 19 Am. Rep. 315, the Court said:

> "The affirmations here set forth as between buyer and seller it has been repeatedly decided, will not support an action, although the defendant knew them to be false when made. They concern the value of the land or its condition and adaptation to particular uses which are only matters of opinion and estimate as to which men may differ. To such representations the maxim Caveat emptor applies. The buyer is not excused from an examination, unless he be fraudulently induced to forbear inquiries which he would otherwise have made."

In *Ellis v. Andrews,* 56 N. Y. 83, 15 Am. Rep. 379, the Court said:

> "Upon questions of value, the purchaser must rely upon his own judgment; and it is his folly to rely upon the representations of the vendor in that respect * * * In Van Epps v. Harrison, 5 Hill. 63 (40 Am. Dec. 341) it is stated as undoubted law that an action will not lie by a purchaser against a vendor upon false and fraudulent statements of the value of the property sold, made while negotiating the sale. This was concurred in by the entire Court."

We submit that the demurrer should have been sustained, and that that complaint does not state a cause of action.

THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE REPRESENTATIONS ALLEGED TO HAVE BEEN MADE BY DEFENDANT.

The charge of the Court upon this matter appears on pages 29-30-31 of the Transcript. Without repeating them in verbatim we wish to call the Court's attention to certain of the statements therein made by the Court in respect of the booklets introduced in evidence being plaintiff's exhibits Nos. 1 and 2.

Concerning the statements in this literature the Court told the jury as matters of law that they were representations of fact; that the particular lots purchased by plaintiff were well adapted to successful commercial orcharding, and that the lands were very rich and fertile and highly productive. These booklets were given to a man who intended to go out and inspect the property and did go out and select out of the many thousands of acres offered for sale, twenty-two acres thereof. Statements of the booklet are

general statements only, as we have hereinbefore argued. Under such circumstances under which they were made, that is, to a man intending to make his own investigation, they were statements of opinion only, and the Court should not have told the jury that they were representations of fact. But certainly, if they be held not to be statements of opinion as matters of law, they are clearly such general statements concerning matters about which all men may differ, and made under such circumstances, that the question of whether or not they were statements of opinion or statements of fact should have been submitted to the jury for decision under appropriate instructions to that end. The Court took this matter from the jury and told them that these statements were representations of fact and in so doing we submit the Court erred.

The instructions were duly excepted to, (Page 156 of the Transcript.)

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF THE FALSITY OF THE REPRESENTATIONS ALLEGED TO HAVE BEEN MADE BY DEFENDANT.

This instruction appears on pages 31-32 of the Transcript and reads as follows:

> "The next step is, did the defendant know that it was false? As I say, having found it false, if you do, then the next step for you to determine is, did the defendant know it was false, or in reason ought he to have known it, or did it make this assertion positively, which is the equivalent of knowledge in the eyes of the law. If it did not know it, why shouldn't it have known it?

> It had handled these lands and dealt with them for fourteen years before it sold this land to the plaintiff. It had been advertising them as fruit lands well adapted to orcharding. Its own name indicates its purpose—Suburban Fruit Lands Company—not Suburban Poultry Lands Company. It had its experts,—its horticulturalists and others, and why wouldn't it know? It undoubtedly had access to chemists. Shouldn't it have known if it did not know? Furthermore, it makes this assertion positively, taking the book for it, and taking the plaintiff's statements, if you do, as to what the agents told him. When a company or a man asserts positively that a thing is adapted to this or to that, is proven to be adapted to this or to that, he is bound to have the knowledge, and the law will not hear him to deny it. It is to be inferred that if it was false he knew it was false. In legal contemplation, it is the equivalent."

This instruction was argumentative in the extreme. It really takes the question of the knowledge of the falsity from the jury. We do not think there can be any doubt but that the jury felt they had been instructed that there was no question as to knowledge if they found the representations false. The Court even told the jury that before making such statements the appellant should have had the land analyzed by chemists and inferentially that if they did not do this and made statements as to fertility and thereafter chemical analysis should show that any element of fertility was lacking they would be chargeable with the knowledge of this, because they had made the statements appearing in the booklet.

The Court said, "It is to be inferred that if it was false he knew it was false. In legal contemplation, it

is the equivalent." The Court even went to the length of telling the jury that the name of the defendant was evidence of the purpose of defendant in selling the land. It said, "Its own name indicates its purpose—Suburban Fruit Lands Company—not Suburban Poultry Lands Company." We submit such a remark was entirely uncalled for. The statements referred to were concerning the adaptability of the land for a certain use and were general statements as to its fertility. It was in evidence that many people still think this land to be fertile and adapted to fruit culture. We submit the Court erred in practically telling this jury that if they believed these statements untrue they should as matters of law find when the defendant made them it knew them to be false.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF PLAINTIFF'S RELIANCE ON THE ALLEGED REPRESENTATIONS.

These instructions are too long to repeat verbatim. They appear on pages 33 to 36 of the transcript. They were extremely argumentative. For instance, the Court referred to plaintiff's statements that he knew nothing about California land or California, or its land values, and continued, "He says he believed what he was told by the agents. He says he believed the agents and he believed the representations in the book. Ask yourself why shouldn't he believe it in his condition? He was dealing with experts; the defendant held itself out as having expert knowledge. It ad-

vertised that it had experts—horticulturalists, and the like." (Page 34 of the Transcript.)

The Court minimized the effect of plaintiff's inspection trip as follows:

> "The plaintiff visited the land before he made his first bargain. Remember, again, what he was, his ability, his occupation. He says he was taken out on the land by Braughler, first. I think he did say that he was on the land a little while, two or three hours, and Braughler came around and showed him two or three places, and took him somewhere else, up to Fair Oaks and elsewhere, and showed him lands. Finally, the plaintiff went to Oakland. * * * He was on the first one only, and he gave it a casual looking over; he did not know anything about soil, or California lands, or fruits, and believing what the defendant told him was true that is all the investigation he made, and he did not discover that the representations were false, if you find they were false."
>
> (Pages 34-35 of the Transcript.)

We have hereinbefore cited the Court to authorities covering the question of the right of persons to rely upon representations made by the seller of the property where after representations were made he commences an investigation. Under such circumstances he is presumed not to rely upon the representations and he is chargeable with such knowledge as an ordinarily prudent man would discover making a prudent investigation into the truth or falsity of the statements made to him. Let us just consider one of these statements,—that as to the value of the land. He had been told that the land was worth $400.00 per acre. His witness testified that it was worth but $50. He comes to the community where the land is situated and be-

gins an investigation into the truth or falsity of these statements as to value. He knows that he is ignorant of the values and makes the inspection of the land by himself, and is not informed of the value of the land because of that ignorance. Consequently, he will ask those qualified to tell him of the value of the land, and will not ask that question of the seller whose statements he is investigating. What does the Court have to say about these matters? As we have hereinbefore pointed out, in its charge to the jury, the Court, contrary to the law as laid down in authorities hereinbefore cited, makes the ignorance of the buyer an excuse for his not having found out the truth about these matters.

The Court says nothing about his investigation of values. Of course, it would be difficult to excuse that. It must be admitted that any investigation as to the matter of values, involving as it must, inquiry of those qualified to speak, would have discovered the falsity of that statement if it was made to him as he said it was. Plaintiff nowhere testified that he had ever asked any questions about the value, although that was the most material statement made to him, and one upon which he claimed to be relying. So we submit that the Court's instruction upon this matter of reliance was against the law, and unfair and prejudicial to the defendant.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF DAMAGES.

The Court instructed the jury on this matter as appears on page 36 of the transcript as follows:

> "Then the next step would be, it must appear that he was damaged. That, again, is an important matter. If the land was actually worth $400 an acre, no matter how many false representations were made to plaintiff, he would have received as much in value as he paid for it. There is no legal damage, unless the land was worth at that time less than what he paid for it. So you are to determine, then, what it the value of the land. If you believe it was worth $400.00 an acre, then, of course, the defendant is entitled to your verdict. If you find it was worth less than $400 an acre, then the plaintiff is entitled to a verdict for the difference. You understand that. If it was worth $100 an acre, he would be entitled to a return of $300 an acre. If he gave that much money for something he did not get, he should have it back. The defendant is not entitled to keep it. If it was worth $200 an acre, he would be entitled to a return of $200 an acre. You will allow him the difference between what you find the land to have been worth, when he bought it, as that is the time of the test, and what he paid for it, which is conceded to be $400 an acre."

Therein the Court told the jury that the plaintiff had paid $400 for the land and that his damage was the difference between that sum and the actual value, per acre, as the jury should, from the evidence, determine it to be. Herein the Court erred for the proof was the following.

Plaintiff alleged in his complaint that he had traded property for the lands he bought, and there was no evidence introduced by him tending to prove that the

property he had turned in was worth the amount which in his complaint he alleged it to have been worth. True, appellant's property had gone in on the basis of $400 per acre and appellee's property had gone in on a basis of $12,600, less $7,136.39 mortgages. But the true measure of appellee's damages was the difference between the value of the property purchased by him and the value of that which he had given in exchange; not the difference between the value of the property he bought and the sum of $400, the trade figure at which that deal had been figured out.

This instruction compelled the jury to find that appelee's property should be treated as a cash payment equal to the alleged value as stated in his complaint, and this, in the absence of any testimony as to its worth, a matter upon which the answer of the defendant raised an issue.

An illustration: Let us suppose that the actual value of appellee's equity in his property amounted to $2000, and the additional money he agreed to pay amounted to $3600, as it approximately would. He would have been paying a total of $5600 for the property, and his damages would be the difference between the actual value, which according to his witness, was $50 per acre, or a total of $1100, and the sum of $5600, or a net damage of $4600, but under the Court's instruction this actual value of $1100 would be subtracted from $8800, leaving him a net damage of $7700. In short, the Court assumed, as proven without any evidence and against the issue,

that plaintiff had paid $400 an acre for the land and as a matter of fact the proof did not show that. The Court should have told the jury to find the value of the property which plaintiff had traded in, and from that sum subtract the actual value of the property he got. But the Court ignored the question of the value of the property he gave, assuming it without any evidence to that effect to have been worth the full amount alleged in plaintiff's complaint and told the jury in effect to add to that value the additional cash price and subtract from the sum the actual value of the land.

The instruction was erroneous, and was, of course, prejudicial. Its giving was duly excepted to. (Page 156 of the Transcript.)

THE COURT ERRED IN INSTRUCTING THE JURY IN RELATION TO THE ABSENCE OF HARRIS, WANZER, HOLMES AND FLETCHER, AS WITNESSES.

The instruction of the Court on this matter appears on page 37 of the transcript, and reads as follows:

> "Mr. Morley testified to his efforts on nearby land in Arcade. He tells you about other orchards, Fletcher, Wanzer, Harris, and Holmes, all nearby, that they had heavy crops. In his opinion it would grow successfully. These men that he mentioned, he says, had commercial orchards. It would have been more enlightening to you and of more value if the defendant called these men and let them tell you about their dealings with this land of theirs. They could have given you figures. It would not be the mere state-

ment of somebody else that they look good, or they produced a heavy crop, or the like. The defendant has not called them. You may take Mr. Morley's testimony in respect to it for as much as you think it worth, and no more. There is a rule of law that if a party produces weaker evidence when stronger evidence is available to him, the jury may take that into consideration in determining how much weight you will give to the weaker evidence. The men who own the orchards and grow the orchards would be better able to give results than some passerby or some caretaker who does not know the results through a series of years of handling the orchard. It is for you, however, to determine the weight to be given to any particular piece of evidence before you."

The witness, Morley, had been called to the stand to testify, (pages 98-106 of the Transcript), and had testified concerning the crops grown upon lands similar to the lands of appellee in the general vicinity, which lands were devoted to horticulture and were under the care of the witness. The owners' names were Harris, Wanzer, Holmes and Fletcher. The owners were not called to testify. It does not appear whether or not they were available. Certainly it could not be assumed that they were. Yet the Court assumed that they were available, and therefore, that because appellant did not produce them the jury could apply the rule as to Morley's testimony, that the testimony of the owners would be less favorable to the appellant, and that for that reason the owners were not produced.

There was no foundation for these derogatory remarks of the Court in respect of the witness Morley's testimony, and of the assumed failure of appellant to present better evidence, and of an ulterior motive in

not producing it. The comments could not have failed to have had a bad effect upon the jury and to have discredited both plaintiff and its witness, Morley. The matter was made the subject of exception and we submit constitutes error. (Page 156 of the Transcript.)

We ask that the judgment be reversed.

Respectfully submitted,

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